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No. 02-102

In The

Supreme Court of the United States

JOHN GEDDES LAWRENCE and TYRON GARNER,

Petitioners,

v.

STATE OF TEXAS

On Writ Of Certiorari
To The Court Of Appeals Of Texas,
Fourteenth District

BRIEF OF THE AMERICAN BAR ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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TABLE OF CONTENTS

	Page
INTEREST OF *AMICUS CURIAE*	1
SUMMARY OF ARGUMENT	3
ARGUMENT	7
THE TEXAS HOMOSEXUAL CONDUCT LAW IS UNCONSTITUTIONAL AND CONTRARY TO THE RULE OF LAW BECAUSE IT INFRINGES INDIVIDUAL LIBERTY AND IRRATIONALLY SINGLES OUT A DISCRETE GROUP FOR SECOND-CLASS TREATMENT	7
A. Laws That Criminalize Private, Noncommercial Sexual Conduct Between Consenting Adults Contravene The Rule Of Law	7
1. The ABA's policies urging the repeal of sodomy laws and prohibiting sexual orientation discrimination reflect a growing consensus that the rule of law does not tolerate intrusions into private, noncommercial sexual conduct between consenting adults or invidious distinctions based on sexual orientation	7
2. Despite the improved treatment of many gay men and lesbians in society, and within the legal profession in particular, the retention of criminal laws that single out same-sex conduct continues to encourage irrational discrimination	12
B. Petitioners' Criminal Convictions Under The Texas Homosexual Conduct Law Violate Liberty and Privacy Interests Protected By The Due Process Clause And *Bowers v. Hardwick* Therefore Should Be Overruled	14

TABLE OF CONTENTS – Continued

Page

1. *Bowers* should be overruled because the weight of this Court's modern precedents supports the conclusion that the right of consenting adults to engage in intimate human conduct implicates a fundamental liberty interest protected by the Due Process Clause and a more complete account of the history of sodomy laws supports that view 16

2. *Bowers* should be overruled because it relied upon an improper narrowing of the Constitution's special protections for family and the home..... 19

3. *Bowers* should be overruled because it is inconsistent with *Romer v. Evans*..... 22

C. Petitioners' Criminal Convictions Under The Texas Homosexual Conduct Law Violate The Equal Protection Clause 25

1. The Texas Homosexual Conduct Law discriminates against gay men and lesbians by criminalizing conduct by same-sex couples that is not criminal when engaged in by different-sex couples..... 25

2. Under the Equal Protection Clause, the desire to harm and stigmatize members of a group, such as gay men and lesbians, is not a legitimate governmental interest..... 27

CONCLUSION 30

TABLE OF CONTENTS – Continued

Page

APPENDICES

Official Policies and Constitutional Amendments of the American Bar Association.....1a

American Bar Association Report No. 2 (Aug. 1973).....10a

A Sampling of Major Law Firms That Have Policies Specifically Prohibiting Discrimination Based On Sexual Orientation.....17a

TABLE OF AUTHORITIES

Page

CASES

Agostini v. Felton, 521 U.S. 203 (1997).....15, 22

Aguilar v. Felton, 473 U.S. 402 (1985) 15

Booth v. Maryland, 482 U.S. 496 (1987).....15

Boy Scouts of Am. v. Dale, 530 U.S. 640 (2000)..... 2

Bowers v. Hardwick, 478 U.S. 186 (1986) .....*passim*

Boyd v. United States, 116 U.S. 616 (1886).....19

Burnet v. Coronado Oil Gas Co., 285 U.S. 393 (1932) 22

Campbell v. Sundquist, 926 S.W.2d 250 (Tenn. Ct. App.), *appeal denied* (Tenn. 1996) 23

Carey v. Population Servs. Int'l, 431 U.S. 678 (1977) 16, 17, 19

Childers v. Dallas Police Dep't, 513 F. Supp. 134 (N.D. Tex. 1981), *aff'd mem.*, 669 F.2d 732 (5th Cir. 1982).....13

City of Cleburne v. Cleburne Living Ctr., Inc., 473 U.S. 432 (1985).....28

Columbia Union Coll. v. Clark, 527 U.S. 1013 (1999).....22

Commonwealth v. Wasson, 842 S.W.2d 487 (Ky. 1992).....23

Cruzan v. Missouri Dep't of Health, 497 U.S. 261 (1990).....16, 25

Department of Agric. v. Moreno, 413 U.S. 528 (1973).....28

Eisenstadt v. Baird, 405 U.S. 438 (1972) 27

TABLE OF AUTHORITIES – Continued

Page

Florida Bd. of Bar Exam'rs re N.R.S., 403 So.2d 1315 (Fla. 1981).....11

Florida ex rel. Florida Bar v. Kimball, 96 So.2d 825 (Fla. 1957) 11

Furman v. Georgia, 408 U.S. 238 (1972).....29

Grady v. Corbin, 495 U.S. 508 (1990).....15

Griswold v. Connecticut, 381 U.S. 479 (1965)...9, 16, 17, 19

Gryczan v. State, 942 P.2d 112 (Mont. 1997).....23

Honselman v. People, 48 N.E. 304 (Ill. 1897).....18

Hunter v. Underwood, 471 U.S. 222 (1985)..... 9

In re Boyd, 307 P.2d 625 (Cal. 1957).....11

James v. Douglas, 941 F.2d 1539 (11th Cir. 1991) 23

Jegley v. Picado, 80 S.W.3d 332 (Ark. 2002).....23

The King v. Wiseman, 92 Eng. Rep. 774 (K.B. 1716).....18

Kyllo v. United States, 533 U.S. 27 (2001).....5, 19

Lochner v. New York, 198 U.S. 45 (1905).....15

Louisville Gas & Elec. Co. v. Coleman, 277 U.S. 32 (1928).....28

Loving v. Virginia, 388 U.S. 1 (1967).....28

Marcum v. McWhorter, 308 F.3d 635 (6th Cir. 2002).....23

Moore v. City of East Cleveland, 431 U.S. 494 (1977) 20

Nabozny v. Podlesny, 92 F.3d 446 (7th Cir. 1996).....23

Nashville, Chattanooga & St. Louis Ry. v. Browning, 310 U.S. 362 (1940).....29

Papachristou v. City of Jacksonville, 405 U.S. 156 (1972).....30

TABLE OF AUTHORITIES – Continued

Page

Payne v. Tennessee, 501 U.S. 808 (1991).....15, 24

Pennsylvania v. Union Gas Co., 491 U.S. 1 (1989) 15

Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833 (1992).....*passim*

Plessy v. Ferguson, 163 U.S. 537 (1896) 15

Poe v. Ullman, 367 U.S. 497 (1961).....17

Post v. State, 715 P.2d 1105 (Okla. Crim. App. 1986).....26

Powell v. State, 510 S.E.2d 18 (Ga. 1998).....23

Railway Express Agency, Inc. v. New York, 336 U.S. 106 (1949).....25

Ring v. Arizona, 122 S. Ct. 2428 (2002).....15

Roe v. Wade, 410 U.S. 113 (1973).....23

Romer v. Evans, 517 U.S. 620 (1996) .....*passim*

School Dist. of Grand Rapids v. Ball, 473 U.S. 373 (1985) 15

Seminole Tribe of Fla. v. Florida, 517 U.S. 44 (1996) 15

South Carolina v. Gathers, 490 U.S. 805 (1989) 15

Stanley v. Georgia, 394 U.S. 557 (1969) 19

State v. Morales, 826 S.W.2d 201 (Tex. App. 1992), *rev'd*, 869 S.W. 2d 941 (Tex. 1994) 29

Stemler v. City of Florence, 126 F.3d 856 (6th Cir. 1997).....23

Sterling v. Burough of Minersville, 232 F.3d 190 (3d Cir. 2000).....23

TABLE OF AUTHORITIES – Continued

Page

Toonen v. Australia, U.N. GAOR, Hum. Rts. Comm., 50th sess., 448th mtg., U.N. Doc. CCPR/C/50/D/488/1992 (1994).....24

TXO Prod. Corp. v. Alliance Res. Corp., 509 U.S. 443 (1993).....29

Troxel v. Granville, 530 U.S. 57 (2000).....20

Union Pacific R. Co. v. Botsford, 141 U.S. 250 (1891).....16

United States v. Carolene Prods. Co., 304 U.S. 144 (1938).....29

United States v. Dixon, 509 U.S. 688 (1993) 15

Vacco v. Quill, 521 U.S. 793 (1997).....22

Vasquez v. Hillery, 474 U.S. 254 (1986) 22

Village of Willowbrook v. Olech, 528 U.S. 562 (2000).....27

Walton v. Arizona, 497 U.S. 639 (1990).....15

Washington v. Glucksberg, 521 U.S. 702 (1997).....29

CONSTITUTION AND STATUTES

U.S. Const. amend. XIV
§ 1, Due Process Clause.....*passim*
§ 1, Equal Protection Clause.....*passim*

Tex. Pen. Code § 21.01(1).....25

Tex. Pen. Code § 21.06 .....*passim*

COURT RULES

Fla. C.J.C. Canon 3(5) (2002) 12

Idaho C.J.C. Canon 2(C) (2002).....12

TABLE OF AUTHORITIES – Continued

Page

Kan. Sup. Ct. R. 601A Canon 3(B)(5) (2002) 12

XIV La. Sup. Ct. R. XVII, § 5(G)(1) (2002) 11

Miss. C.J.C. Canon 3(B)(5) (2002) 12

Okla. Stat. tit. 5, app. 4, Canon 3(B)(4) (2003) 12

Tex. C.J.C. Canon 3(B)(6) (2002) 12

Utah C.J. Admin. Canon 3(B)(5) (2002) 12

MISCELLANEOUS

American Academy of Pediatrics, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 341 (Feb. 2002) 20

American Bar Ass'n, *Model Code of Judicial Conduct* (1990) 2, 4

American Bar Ass'n, *Policy & Procedures Handbook* (2002) 7

American Bar Ass'n, *Standards for Approval of Law Schools* (2002) 10

American Law Institute, *Principles of the Law of Family Dissolution* (2002) 20

American Law Institute, *Model Penal Code and Commentaries* (1980) 26

American Law Institute, *Model Penal Code* (Tentative Draft No. 4, 1955) 8, 9

American Law Institute, *Transcript of Proceedings* (1955) 9

TABLE OF AUTHORITIES – Continued

Page

Dan Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources*, 37 Demography 139 (May 2000) 20

D'Vera Cohn, *Count of Gay Couples Up 300%*, Wash. Post, Aug. 22, 2001, at A3 19

William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. Ill. L. Rev. 631 ..... 8, 9, 10, 26, 27

Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1 (1997) 7

Peter Finn & Taylor McNeil, *The Response of the Criminal Justice System to Bias Crime: An Exploratory Review* (1987) 14

Anne B. Goldstein, *History, Homosexuality, and Political Values*, 97 Yale L.J. 1073 (1998) 18

E.J. Graff, *Welcoming the Invisible Bar: Lesbian and Gay Attorneys*, Diversity & the Bar, June 2002, at 13 10

Hillary Greene, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 Yale L. & Pol'y Rev. 169 (1997) 12

Mark Hansen, *Bolstering Benefits*, 84 A.B.A.J. 32 (1998) 21

Human Rights Campaign Foundation, *The State of the Workplace for Lesbian, Gay, Bisexual and Transgender Americans 2001* 10, 21

TABLE OF AUTHORITIES – Continued

Page

International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171 ..... 2, 24

Law School Admission Council, *Out & In: Information for Lesbian, Gay, Bisexual & Transgendered Law School Applicants* (2001) 11, 21

Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 Harv. C.R.-C.L. L. Rev. 103 (2000) 12, 13, 14, 26

John May, *The Law of Crimes* (2d ed. 1893) 18

Robert B. Mison, Comment, *Homophobia in Manslaughter*, 80 Cal. L. Rev. 133 (1992) 13, 14

National Inst. of Mental Health Task Force on Homosexuality, *Final Report and Background Papers* (1972) 9

Report of the District of Columbia Bar Task Force on Sexual Orientation and the Legal Workplace (Mar. 1999) 13

Deborah L. Rhode & David Luban, *Legal Ethics* (3d ed. 2001) 12

Paul Tappan, *The Habitual Sex Offender: Report and Recommendations of the [New Jersey] Commission on the Habitual Sex Offender* (1950) 8

Penny Weaver, *Pro-Gay Danburg Ousted by Wong*, Houston Voice, Nov. 8, 2002, at 1 13

Donald T. Weckstein, *Recent Developments in the Character and Fitness Qualifications for the Practice of Law*, 40 B. Examiner 17 (1971) 11

Sherri Williams, *Judicial Reprimand Suggested*, Clarion-Ledger, Dec. 21, 2002, at 2B 14

TABLE OF AUTHORITIES – Continued

Page

Two Firms Rated Best for Working Moms, N.Y. Lawyer, http://www.nylawyer.com/news/02/10/100102r.html, Oct. 1, 2002 21

138 Cong. Rec. 8070-8071 (1992) 24

INTEREST OF *AMICUS CURIAE*[1]

The American Bar Association (ABA) is the leading national membership organization of the legal profession. It has a membership of more than 400,000 attorneys throughout the United States, including attorneys in private law firms, corporations, nonprofit organizations, government agencies, and prosecutorial and public defender offices, as well as legislators, law professors, and students.[2] The ABA's membership is composed of attorneys, including gay and lesbian attorneys, in all 50 States.

Over the past 30 years, the ABA has sought repeatedly to further the rule of law by advocating the elimination of laws that criminalize noncommercial, private sexual conduct between consenting adults, as well as laws and policies that discriminate against gay men and lesbians. In 1973, the ABA, through its House of Delegates,[3] adopted a policy urging States to repeal all laws criminalizing noncommercial sexual contact between consenting adults

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[1] Letters from all parties consenting to the filing of this brief are being filed with the Clerk of this Court along with this brief. No counsel for a party authored this brief in whole or in part, and no person other than *amicus curiae*, or its counsel, made a monetary contribution to the preparation or submission of this brief.

[2] Neither this brief nor the decision to file it should be interpreted to reflect the views of any judicial member of the ABA. No inference should be drawn that any member of the Judicial Division Council has participated in the adoption or endorsement of the positions in this brief. This brief was not circulated to any member of the Judicial Division Council prior to filing.

[3] The House of Delegates is the ABA's policy-making body, comprising over 500 delegates and representing various entities within the ABA, as well as the legal profession as a whole. Reports that recommend the adoption of specific policy positions are submitted by ABA sections, committees, affiliated organizations, state and local bar associations and individual ABA members. The full House votes on the recommendations and those that are passed by the House become the official policies of the ABA.

in private. *See* App., *infra*, 1a.[4] The ABA has since adopted a series of other policies that make clear its support for the equal treatment of all persons, regardless of sexual orientation, in employment, housing, public accommodations, education, and judicial proceedings. *See* App., *infra*, 3a (policy adopted August 1987 regarding bias-motivated crimes); App., *infra*, 3a-4a (policy adopted August 1989 regarding discrimination in employment, housing, and public accommodations); App., *infra*, 4a (Model Code of Judicial Conduct, Canon 3B(5), adopted August 1990); App., *infra*, 4a (policy adopted August 1991 regarding bias in federal judicial system); App., *infra*, 4a-5a (policy adopted February 1992 regarding discrimination on university campuses). Relying upon those policies, the ABA filed briefs as *amicus curiae* in *Romer v. Evans*, 517 U.S. 620 (1996), and in *Boy Scouts of America v. Dale*, 530 U.S. 640 (2000).

The ABA also has adopted policies that support equal treatment by the government of family relationships involving gay men and lesbians, including those involving adoption, child custody and visitation rights, and crime victim compensation funds. *See* App., *infra*, 8a (policy adopted August 1995 regarding child custody and visitation); App., *infra*, 8a-9a (policy adopted February 1999 regarding adoption); App., *infra*, 9a (policy adopted August 2002 regarding same-sex domestic partners' eligibility for crime-victim compensation funds). In addition, in 1979, the ABA adopted a policy urging the United States to ratify the International Covenant on Civil and Political Rights, *opened for signature* Dec. 19, 1966, 999 U.N.T.S. 171, which commits State parties to respect the civil rights of all persons within their jurisdiction. *See* App., *infra*, 1a-3a. That treaty, ratified by the United States in 1992, includes provisions that the United Nations Human Rights Committee has construed to prohibit the criminalization of

[4] The ABA policies cited in this brief are reprinted below in the appendix. *See* App., *infra*, 1a-9a.

consensual adult sodomy and discrimination on the basis of sexual orientation. *See* note 15 *infra*.

The ABA has made special efforts to eliminate discrimination against gay men and lesbians who are, or wish to become, attorneys. In 1992, the ABA amended its constitution to make the National Lesbian and Gay Law Association an affiliated organization with a vote in the House of Delegates. *See* App., *infra*, 5a, codified at Constitution of the ABA, § 6.8(a). In 1994, the ABA incorporated into its Standards for Approval of Law Schools a requirement that accredited institutions not discriminate on the basis of sexual orientation in admissions. *See* App., *infra*, 5a-8a. In 1996, the ABA adopted a policy urging state and local bar associations to study bias against gay men and lesbians within the legal profession and the criminal justice system and to make recommendations to eliminate such bias. *See* App., *infra*, 8a. Most recently, in 2002, the ABA amended its constitution to specify that state or local bar associations may not be represented in the House of Delegates if they discriminate on the basis of sexual orientation. App., *infra*, 9a, codified at Constitution of the ABA, § 6.4(e).

Given the nature and extent of the concerns addressed in the ABA policies described above, the ABA has a strong interest in the proper resolution of the questions presented in this case to ensure the protection of liberty and equal justice under law.

SUMMARY OF ARGUMENT

The Texas Homosexual Conduct Law infringes individual liberty by authorizing the State, through its criminal law, to intrude upon intimate associations, to undermine bodily integrity, and to invade the privacy of the home. It also irrationally singles out a discrete group for second-class treatment. The statute thereby undermines the rule of law and should be declared unconstitutional.

A. Thirty years ago, *amicus curiae*, the American Bar Association (ABA), adopted a policy urging States to

repeal laws that criminalize private, noncommercial sexual contact between consenting adults. That 1973 ABA policy, like the similar recommendation of the American Law Institute's Model Penal Code, was rooted in concerns that criminal sodomy statutes undermined the rule of law because no legitimate government interest warranted criminalizing the conduct; enforcement required intrusive police investigations; many Americans engaged in the conduct in disregard of the criminal prohibition, thereby undermining the public's respect for the law; the laws were arbitrarily enforced and members of racial minorities tended to be the persons prosecuted; there was a serious question of the statutes' constitutionality; and, although the laws applied to both heterosexual and homosexual conduct, they were most often enforced against, and used to discriminate against, gay men and lesbians. Since 1973, the ABA has adopted a series of other policies that make clear its support for the equal treatment of all persons, regardless of sexual orientation.

All but 13 States now have repealed or judicially invalidated their criminal sodomy statutes. Contrary to the practices of an earlier era, state bars across the nation have determined that qualified gay men and lesbians should not be denied admission to the legal profession based on their sexual orientation. A majority of state courts, as well as many national law firms and law schools, have adopted policies prohibiting discrimination based on sexual orientation. The success of those policies demonstrates the irrationality of discrimination based on sexual orientation.

The Texas Homosexual Conduct Law and similar statutes, however, continue to stigmatize gay men and lesbians. The laws are used to justify discrimination against gay men and lesbians as second-class citizens not entitled to the same government protections as other members of society. Declaring Texas's Homosexual Conduct Law unconstitutional will remove that untenable justification for such conduct and will vindicate the rule of law.

B. The criminal convictions of petitioners under the Texas statute violate constitutionally protected liberty and privacy interests. Although the Court held in *Bowers v. Hardwick*, 478 U.S. 186, 191 (1986), that "homosexual sodomy" was not protected by the Due Process Clause, that holding is inconsistent with the weight of this Court's modern precedents regarding the Constitution's special protections for intimate association, bodily integrity, and the privacy of the home. In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833, 857 (1992), the Court reaffirmed two lines of precedent that, over more than a hundred years, have recognized that the substantive component of the Due Process Clause protects "liberty relating to intimate relationships" and "personal autonomy and bodily integrity." An adult's right to engage in private, noncommercial, consensual intimate conduct is protected under the rationale of those lines of cases as reiterated and refined in *Casey*. *Bowers* departed from those cases by describing the historical right at issue as "homosexual sodomy" and did not take into account the fact that, at the time the Fourteenth Amendment was ratified in 1868, nearly all of the States criminalized *all* sodomy. States' criminal statutes did not single out same-sex conduct until the mid-20th Century.

To deny same-sex couples protection from criminal prosecution for private noncommercial, consensual sexual conduct is also inconsistent with the Court's decisions that recognize the heightened protection accorded by the Constitution to conduct that takes place in the home. *See Kyllo v. United States*, 533 U.S. 27, 37 (2001). *Bowers* relied upon the conclusion that there had been no connection demonstrated between homosexual activity and the family. That connection has since been well documented through census figures that establish that more than one million people in this country live with a same-sex partner, and through studies that indicate, for example, that approximately 22% of partnered lesbians and 5% of partnered gay men are raising children in their homes – forming families that are nontraditional, but entitled to constitutional protection from state interference.

Finally, *Bowers* should be overruled because it is inconsistent with *Romer v. Evans*, 517 U.S. 620 (1996). *Romer*'s holding that the mere desire to make gay men and lesbians "unequal to everyone else" was not a legitimate government interest, *id.* at 635, is irreconcilable with *Bowers*' holding that the "belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" is sufficient to justify a criminal sodomy law, 478 U.S. at 196.

C. The Texas Homosexual Conduct Law also rests on a classification that is not rationally related to any legitimate government interest and thus violates the Equal Protection Clause. The disparate treatment of homosexual and heterosexual sodomy is a modern development that reflects the unwillingness of the majority to be subject to the same criminal strictures that are imposed on the minority, contrary to a fundamental tenet of the rule of law. There is no relationship between the State's asserted interest in encouraging marriage and biological reproduction, Br. in Opp. 18, and the classification at issue. The State's classification allows unmarried heterosexuals to engage in nonprocreative sexual conduct, but prohibits other unmarried persons (gay and lesbian couples) from engaging in the very same conduct. Tradition and history do not support the State's unequal treatment because sodomy laws singling out same-sex conduct are of only recent vintage. Ultimately, the State's only rationale for the Texas Homosexual Conduct Law is the "communal belief that the [homosexual] conduct is wrong and should be discouraged." Br. in Opp. 19. But that belief is not sufficient to justify a criminal sanction in light of the Court's holding in *Romer* that mere disapproval of homosexuality does not constitute a "legitimate government purpose" for "singling out a certain class of citizens for disfavored legal status or general hardships." 517 U.S. at 634, 633. Indeed, Texas's admitted practice of rarely enforcing the criminal statute undermines any claim that the statute actually furthers a legitimate state interest.

ARGUMENT

THE TEXAS HOMOSEXUAL CONDUCT LAW IS UNCONSTITUTIONAL AND CONTRARY TO THE RULE OF LAW BECAUSE IT INFRINGES INDIVIDUAL LIBERTY AND IRRATIONALLY SINGLES OUT A DISCRETE GROUP FOR SECOND-CLASS TREATMENT.

A. Laws That Criminalize Private, Noncommercial Sexual Conduct Between Consenting Adults Contravene The Rule Of Law.

The Texas Homosexual Conduct Law, Tex. Pen. Code § 21.06, and other statutes that criminalize private, noncommercial sexual behavior between consenting adults contravene the rule of law. Conceptually, the "rule of law" is a broad term that encompasses both procedural and substantive limitations on government power. At its core, it requires evenhanded and neutral enforcement of rules that respect the rights of individuals as autonomous beings to live their lives free from arbitrary governmental restraints. *See generally* Richard H. Fallon, Jr., *"The Rule of Law" as a Concept in Constitutional Discourse*, 97 Colum. L. Rev. 1 (1997). The American Bar Association (ABA) is committed to advancing the rule of law in the United States and throughout the world. *See* American Bar Ass'n, *Policy & Procedures Handbook* 2, Goal VIII (2002).

1. The ABA's policies urging the repeal of sodomy laws and prohibiting sexual orientation discrimination reflect a growing consensus that the rule of law does not tolerate intrusions into private, noncommercial sexual conduct between consenting adults or invidious distinctions based on sexual orientation.

In 1973, the ABA adopted a policy urging States "to repeal all laws which classify as criminal conduct any form

of noncommercial sexual contact between consenting adults in private, saving only those portions which protect minors or public decorum." App., *infra*, 1a. That policy represented the culmination of decades of study by States and the legal profession regarding the tension between protecting individual liberty and using the criminal law to regulate noncommercial sexual behavior between consenting adults in the privacy of their homes, particularly when such laws often were enforced arbitrarily to target gay men and lesbians.

Beginning after World War II, several state commissions studying criminal sexual offenses, including those in New Jersey, New York, Illinois, and California, published influential reports arguing that private, noncommercial consensual same-sex sexual conduct is not the proper concern of the law. *See* William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. Ill. L. Rev. 631, 661-662. One well-known report concluded that state laws should distinguish between conduct that merely may offend community morals (*e.g.*, homosexual conduct), and dangerous, aggressive conduct that is an actual threat to the community. *See* Paul Tappan, *The Habitual Sex Offender: Report and Recommendations of the [New Jersey] Commission on the Habitual Sex Offender* 17-18 (1950). Those reports were relied and expanded upon by the American Law Institute (ALI) in 1955 in the course of drafting its Model Penal Code. *See* Model Penal Code § 207.5(1) commentary at 277-278 (Tentative Draft No. 4, 1955).

The ALI, under the direction of Herbert Wechsler as Chief Reporter, determined that statutes criminalizing consensual adult sexual conduct undermine the rule of law in at least three ways. First, the ALI concluded that no legitimate government interest warrants criminalizing private conduct between consenting adults that does not harm other people, particularly in light of the intrusive police investigations that would be necessary if the statutes were to be enforced. *Id.* § 207.5 commentary at 277, 278, 279. As Judge Learned Hand explained during the debate on the question whether to recommend the decriminalization of consensual sodomy: "I think it is a

matter of morals, a matter very largely of taste, and it is not a matter that people should be put in prison about." American Law Institute, *Transcript of Proceedings* 129 (May 19, 1955). Second, the ALI concluded that sodomy laws criminalize conduct in which many Americans (both heterosexual and homosexual) engage and that respect for the law is undermined by such widespread disregard for a criminal prohibition. *See* Model Penal Code §§ 207.1, 207.5 commentary at 206, 276 (Tentative Draft No. 4, 1955). Third, it concluded that sodomy laws were being enforced arbitrarily. The large majority of offenders escaped detection, and those who were criminally prosecuted and imprisoned tended to be drawn from racial minority groups. *Id.* at 205, 278.[5] Moreover, sodomy laws created a significant risk of blackmail. *Id.* at 278-279; *see also* National Inst. of Mental Health Task Force on Homosexuality, *Final Report and Background Papers* 6 & n.5 (1972) (estimating more than ten percent of gay men subjected to blackmail).

The 1973 ABA policy stemmed from rule-of-law concerns similar to those that motivated the ALI. The ABA policy recommended the repeal of all laws that regulated noncommercial sexual contact between consenting adults in private. App., *infra*, 1a. The Report supporting adoption of the policy specifically relied upon the ALI's assessment of the high cost that the laws imposed on personal autonomy and the lack of any corresponding benefit to the State. *See* App., *infra*, 12a, 14a. The Report also pointed to decisions of this Court, including *Griswold v. Connecticut*, 381 U.S. 479 (1965), and stated that "there is a serious question of the constitutionality of such statutory prohibitions against

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[5] Historically, the enforcement of criminal sodomy laws often was tainted by racial considerations. *See* Eskridge, *supra*, at 649 (in 1880 more than half the people imprisoned for sodomy were people of color in the South); *cf. Hunter v. Underwood*, 471 U.S. 222, 226-227, 232 (1985) (reliance on sodomy convictions was a mechanism for disenfranchising black men).

consensual sodomy." *Id.* at 13a. The Report noted that another reason for repealing the sodomy laws was that they were "most often applied against homosexuals, both in enforcement of the statutes themselves and as a basis for discrimination against homosexuals on the ground that they are most likely violating the law." *Id.* at 12a.

At the time the ABA adopted the 1973 policy, nine States (Colorado, Connecticut, Delaware, Hawaii, Illinois, New Hampshire, North Dakota, Ohio, and Oregon) already had repealed their criminal laws prohibiting consensual adult sodomy; in another two States (Alaska and Florida), state courts had partially invalidated their laws. *See* Eskridge, *supra*, at 686 tbl. In the 30 years since then, such laws have been legislatively repealed or judicially invalidated in all but 13 States. Pet. 4, 24.

Since 1973, the ABA has also adopted many policies urging the elimination of sexual orientation discrimination. *See* pages 2-3, *supra*. Many leading law firms have implemented nondiscrimination policies that parallel the recommendations of the ABA.[6] Law schools likewise have proscribed sexual orientation discrimination in compliance with ABA policy.[7] The success of nondiscrimination policies

[6] For example, a review of forms submitted by law firms to the National Association for Law Placement (NALP) reveals that 81 of the nation's 100 top revenue-producing law firms indicated that they have nondiscrimination polices that expressly apply to sexual orientation. *See, e.g.*, App., *infra*, 17a-19a. Moreover, several other major law firms, whose responses on their NALP forms did not so indicate, specify on their websites that they have such policies. *Cf.* Human Rights Campaign Foundation, *The State of the Workplace for Lesbian, Gay, Bisexual and Transgender Americans 2001*, at 5 (59% of Fortune 500 companies have adopted policies to prohibit sexual orientation discrimination); E.J. Graff, *Welcoming the Invisible Bar: Lesbian and Gay Attorneys*, Diversity & the Bar, June 2002, at 13 (collecting examples, including Texas-based Gardere Wynne Sewell LLP, in which openly gay and lesbian lawyers serve in key management positions in law firms).

[7] *See* American Bar Ass'n, *Standards for Approval of Law Schools*, Standard 210(a) (2002) (requiring ABA-accredited law schools to "foster

(Continued on following page)

adopted by legal employers and law schools demonstrates the irrationality of discrimination based on sexual orientation.

Finally, state courts across the nation have determined that qualified gay men and lesbians should not be denied admission to the legal profession because of their sexual orientation. In the past, a number of States had excluded known gay men and lesbians from the bar on the rationale that their presumed violation of criminal sodomy laws meant that they did not meet the "good moral character" requirement. *See, e.g.*, *Florida v. Kimball*, 96 So.2d 825 (Fla. 1957); *In re Boyd*, 307 P.2d 625 (Cal. 1957); *cf.* Donald T. Weckstein, *Recent Developments in the Character and Fitness Qualifications for the Practice of Law*, 40 B. Examiner 17, 20 (1971) (in anticipation of bar's "moral character" requirement, about one-third of law schools would "take a hard look at . . . homosexual activity before admitting an applicant"). But state bars all across the nation, even in States that still criminalize sodomy, have since rejected that rationale and revised their rules and policies to permit gay and lesbian applicants to become licensed attorneys based on the determination that whether one engages in consensual same-sex sodomy does not affect whether one is of "good moral character." *See, e.g.*, *Florida Bd. of Bar Exam'rs re N.R.S.*, 403 So.2d 1315 (Fla. 1981); XIV La. Sup. Ct. R. XVII, § 5(G)(1) (2002). Indeed, not only have all States ceased the practice of excluding gay men and lesbians from the legal profession, but a majority of state courts have adopted policies to protect lesbian and gay lawyers, litigants, and court

and maintain equality of opportunity in legal education . . . without discrimination or segregation on ground of race, color, religion, national origin, sex, or sexual orientation" in admissions and hiring); Law School Admission Council, *Out & In: Information for Lesbian, Gay, Bisexual & Transgendered Law School Applicants* 3, 6-11 (2001) (reporting that all 178 laws schools that responded to survey had policy prohibiting sexual orientation discrimination and listing 118 law schools with openly gay and lesbian faculty members).

personnel from manifestations of bias and prejudice, in keeping with the ABA's Model Code of Judicial Conduct.[8]

2. Despite the improved treatment of many gay men and lesbians in society, and within the legal profession in particular, the retention of criminal laws that single out same-sex conduct continues to encourage irrational discrimination.

Laws that criminalize private same-sex intimate conduct, even those not regularly enforced, serve to legitimize discrimination, hatred, and even violence against gay men and lesbians. By branding gay and lesbian citizens as lawbreakers, such laws impose a government-sanctioned stigma that impedes the efforts of gay men and lesbians to obtain equal justice under law. *See generally* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 Harv. C.R.-C.L. L. Rev. 103 (2000); Hillary Greene, *Undead Laws: The Use of Historically Unenforced Criminal Statutes in Non-Criminal Litigation*, 16 Yale L. & Pol'y Rev. 169 (1997).

Despite the progress that has been made in eliminating discrimination within the legal profession and society as a whole, criminal sodomy laws are still cited as a justification for discrimination against gay and lesbian Americans. In a recent study, one law firm in Virginia explained that it does "not employ and would not knowingly employ a homosexual attorney" because sodomy "is a

[8] More than 30 States, including seven of the States that make sodomy a criminal offense, expressly prohibit judges from manifesting bias or prejudice based on sexual orientation in the performance of their judicial duties. *See, e.g.*, Fla. C.J.C. Canon 3(5) (2002); Idaho C.J.C. Canon 2(C) (2002); Kan. Sup. Ct. R. 601A Canon 3(B)(5) (2002); Miss. C.J.C. Canon 3(B)(5) (2002); Okla. Stat. tit. 5, app. 4, Canon 3(B)(4) (2003); Tex. C.J.C. Canon 3(B)(6) (2002); Utah C.J. Admin. Canon 3(B)(5) (2002); *see also* Deborah L. Rhode & David Luban, *Legal Ethics* 53 (3d ed. 2001).

crime in Virginia" and "[i]t therefore would be wrong . . . for a law firm to employ homosexuals or condone homosexual conduct." *Report of the District of Columbia Bar Task Force on Sexual Orientation and the Legal Workplace* App. C, at 39 cmt. 166 (Mar. 1999). Similarly, the Texas Homosexual Conduct Law has been used to justify opposition to the candidacy of an openly gay justice of the peace. As one member of the candidate's own party argued, "whether you like it or not, there is a state law that prohibits sodomy in the state of Texas, and having a judge who professes to have a lifestyle that violates state law . . . is wrong." Penny Weaver, *Pro-Gay Danburg Ousted by Wong*, Houston Voice, Nov. 8, 2002, at 1; *cf. Childers v. Dallas Police Dep't*, 513 F. Supp. 134, 138 (N.D. Tex. 1981) (in suit for employment discrimination, supervisor in Dallas Police Department testified that he told a gay applicant that he would not be hired in part "because his sexual practices violated state law"), *aff'd mem.*, 669 F.2d 732 (5th Cir. 1982).

Criminal sodomy laws are also viewed by some members of society, including some participants in the legal system, as a justification for setting gay men and lesbians apart as second-class citizens not entitled to the same government protections as other members of society. *See* Leslie, *supra*, at 123-124. Such attitudes have been exhibited by some members of the judiciary in States that have such laws. For example, in 1988, a Texas judge explained his refusal to impose a life sentence on a defendant convicted of killing two gay men on the ground that "I don't much care for queers cruising the streets [and] . . . [I] put prostitutes and gays at about the same level . . . and I'd be hard put to give somebody life for killing a prostitute." Robert B. Mison, Comment, *Homophobia in Manslaughter*, 80 Cal. L. Rev. 133, 163 (1992). Similarly, a Florida judge presiding over a pre-trial hearing of defendants charged with beating a gay man to death in 1987 asked the prosecutor "That's a crime now, to beat up a homosexual?" and

when told that it was, responded, "Times really have changed." *Ibid.*[9] Because the existence of sodomy laws reinforces those attitudes, many gay men and lesbians who are crime victims are reluctant to come forward for fear that the focus will be on their status as putative lawbreakers rather than as victims. *See* Leslie, *supra*, at 125. That reluctance, in turn, contributes to the fact that gay men and lesbians are frequent victims of hate crimes. *See id.* at 122; Peter Finn & Taylor McNeil, *The Response of the Criminal Justice System to Bias Crime: An Exploratory Review* 2, 17 (1987).

Thus, even when not enforced, sodomy laws encourage irrational and arbitrary treatment of gay men and lesbians. Declaring Texas's Homosexual Conduct Law unconstitutional will remove that untenable justification for such conduct and will vindicate the rule of law.

B. Petitioners' Criminal Convictions Under The Texas Homosexual Conduct Law Violate Liberty and Privacy Interests Protected By The Due Process Clause And *Bowers v. Hardwick* Therefore Should Be Overruled.

The ABA's policy urging repeal of criminal sodomy statutes applies to all such statutes, whether they are facially neutral or targeted at homosexual conduct alone. That 30-year-old policy reflects the principle that intimate,

[9] *See also* Sherri Williams, *Judicial Reprimand Suggested*, Clarion-Ledger, Dec. 21, 2002, at 2B (reprimand recommended for Mississippi judge who wrote a letter to a newspaper stating "[i]n my opinion, gays and lesbians should be put in some type of mental institute"); State Bar of Arizona Web site, http://www.azbar.org/Sections/Committees/SOGI/summary.asp (state bar study found that 13% of judges and attorneys have observed negative treatment by judges in open court toward those perceived to be gay or lesbian, 45% have heard negative remarks about a lesbian or gay person in the context of a particular case, and 8% have heard court personnel indicate a preference not to work with a lawyer because he or she is perceived to be gay or lesbian).

sexual conduct between two consenting adults that occurs in the privacy of the home should not be the basis of a criminal conviction absent some truly compelling government interest.[10] In *Bowers v. Hardwick*, 478 U.S. 186 (1986), however, a sharply divided Court held that "homosexual sodomy" was not protected by the substantive component of the Fourteenth Amendment's Due Process Clause.

Although the doctrine of *stare decisis* should generally be followed, it "is not an inexorable command," *Payne v. Tennessee*, 501 U.S. 808, 828 (1991) (overruling *Booth v. Maryland* (1987), and *South Carolina v. Gathers* (1989)), particularly in constitutional cases, *see Seminole Tribe of Fla. v. Florida*, 517 U.S. 44, 63 (1996) (overruling *Pennsylvania v. Union Gas Co.* (1989)).[11] Overruling a prior decision is particularly warranted when "facts, or an understanding of facts, [have] changed from those which furnished the claimed justifications for the earlier constitutional resolution[ ]." *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 863 (1992) (discussing rationale for overruling *Lochner v. New York* and *Plessy v. Ferguson*). Viewed in the proper factual context, *Bowers*' holding is inconsistent with more recent precedents that reaffirm the Constitution's special protections for intimate association, bodily integrity, and activities that occur in the home. Moreover, *Bowers* rested on an incomplete account of the history surrounding the right at issue and

[10] In the present case, Texas conceded that it could establish no interest that would meet that requirement. Pet. App. 76a (at oral argument in the state appellate court, respondent's counsel could not "even see how he could begin to frame an argument that there was a compelling State interest").

[11] *See also Ring v. Arizona*, 122 S. Ct. 2428 (2002) (overruling *Walton v. Arizona* (1990)); *Agostini v. Felton*, 521 U.S. 203 (1997) (overruling *Aguilar v. Felton* (1985), and *School Dist. of Grand Rapids v. Ball* (1985)); *United States v. Dixon*, 509 U.S. 688 (1993) (overruling *Grady v. Corbin* (1990)); *Payne*, 501 U.S. at 828 n.1 (collecting cases from prior 20 Terms overruling 33 constitutional decisions).

inaccurate factual assumptions about the lives and family relationships of gay men and lesbians. Finally, *Bowers* cannot be reconciled with the Court's more recent decision in *Romer v. Evans*, 517 U.S. 620 (1996). For all these reasons, *Bowers* should be overruled.

1. *Bowers* should be overruled because the weight of this Court's modern precedents supports the conclusion that the right of consenting adults to engage in intimate human conduct implicates a fundamental liberty interest protected by the Due Process Clause and a more complete account of the history of sodomy laws supports that view.

In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 505 U.S. 833 (1992), this Court identified two "lines of decisions" in which the Court, for more than a hundred years, has recognized that the substantive component of the Due Process Clause protects "liberty relating to intimate relationships" and "personal autonomy and bodily integrity." *Id.* at 857; *see also Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 287-288 (1990) (O'Connor, J., concurring) (citing, *inter alia*, *Union Pacific R. Co. v. Botsford*, 141 U.S. 250, 251 (1891)). In determining whether an adult's right to engage in private consensual, intimate conduct is a component of liberty protected as a substantive matter by the Due Process Clause, the Court need only look to those lines of decisions, particularly to *Griswold v. Connecticut*, 381 U.S. 479 (1965), and *Carey v. Population Services International*, 431 U.S. 678 (1977).

In *Griswold*, the Court held that the State could not prohibit married couples from using contraception and thus concluded that the State could not require married couples to refrain from non-procreative sexual activity. *Carey* extended that holding to unmarried persons. While the majority in *Carey* framed that right in terms of the "right to decide to prevent conception" and disclaimed any

broader holding, 431 U.S. at 688 n.5, the Court's ruling did not protect merely a right to abstain from sexual relations. Rather, that decision and *Griswold* mean that adults have a right to be free of state interference in deciding whether and how to conduct their intimate sexual relationships. Justice Powell acknowledged as much in describing the right at issue as "the constitutionally protected privacy in decisions concerning sexual relations." *Id.* at 711 (Powell, J., concurring in part and concurring in judgment).

By characterizing *Griswold* and *Carey* as involving only the right not to procreate, *Bowers* failed to capture the full scope of the right at issue in those cases. As the Court has since explained in *Casey*, those opinions and their predecessors were rooted in the second Justice Harlan's conclusion that the Due Process Clause includes "a freedom from all substantial arbitrary impositions and purposeless restraints." 505 U.S. at 848 (quoting *Poe v. Ullman*, 367 U.S. 497, 543 (1961) (Harlan, J., dissenting from dismissal on jurisdictional grounds)). The same rule-of-law principles of individual autonomy and privacy that informed the recommendations of the ALI and ABA to repeal criminal sodomy laws are reflected in the *Casey* Court's conclusion that matters "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment." *Id.* at 851. Because *Griswold* and *Carey* establish that substantive due process protects the right of consenting adults to engage in intimate sexual conduct in the privacy of their homes, this Court should overrule *Bowers* and hold that the Texas Homosexual Conduct Law violates the Constitution.

Bowers sought to distinguish those lines of cases by describing the interest at stake as the right to engage in "homosexual sodomy" and by suggesting that the long history of sodomy laws militates against constitutional protection of that right. But *Bowers* did not address the significance of the fact that it was not until the mid-20th Century that sodomy laws singled out same-sex intimate conduct. Historically, States prohibited certain forms of

sexual conduct among *all* adults, including both homosexual and heterosexual, both married and single. In 1868, the year of the Fourteenth Amendment's ratification, 32 of the then-37 States criminalized sodomy. *See Bowers*, 478 U.S. at 193. In all but one of those States, the criminal prohibition of sodomy included conduct engaged in by different-sex couples.[12] The laws were focused on particular conduct, rather than the identity of the participants. Indeed, under those laws, even the conduct of married couples could be punished. *See* John May, *The Law of Crimes* § 203 (2d ed. 1893) ("Sodomy . . . may be committed . . . by a man with a woman – his wife, in which case, if she consent, she is an accomplice."); *Honselman v. People*, 48 N.E. 304, 305 (Ill. 1897) ("this is a crime committed between two persons both of whom consent, and it may even be committed by husband and wife")).

Bowers provided no reasoned basis for disregarding that history of equivalent treatment of same-sex and different-sex sodomy and redefining the liberty interest at issue in a way that excludes intimate sexual conduct engaged in by persons of the same sex. More fairly viewed, the historical practice of criminalizing sodomy between consenting adults in private is essentially incompatible

[12] Between 1791 and 1868, no State enacted a law that "singled out sexual acts between men for special prohibition." Anne B. Goldstein, *History, Homosexuality, and Political Values*, 97 Yale L.J. 1073, 1084 (1998). Sodomy laws enacted prior to 1791 in Connecticut, New Hampshire, and Massachusetts, arguably prohibited only male-male conduct. *See id.* at 1082 n.60. By the time the Fourteenth Amendment was ratified, however, two of those three States had amended their criminal sodomy laws so that they applied to male-female couples as well. *See id.* at 1084 nn.66 & 68 (laws of Connecticut and Massachusetts were amended in 1821 and 1805, respectively, in ways that made clear that sodomous conduct was proscribed for all couples). Indeed, there is some indication that the laws in those States had always prohibited male-female sodomy, as similar prohibitions had been interpreted to include sodomous conduct between a man and a woman. *See The King v. Wiseman*, 92 Eng. Rep. 774, 775 (K.B. 1716).

with the two "lines of decisions" identified in *Casey*, 505 U.S. at 857, and exemplified by *Griswold* and *Carey*. The holdings of those cases should control here.

2. *Bowers* should be overruled because it relied upon an improper narrowing of the Constitution's special protections for family and the home.

To deny same-sex couples constitutional protection from criminal prosecution for their private sexual conduct is also inconsistent with the decisions of the Court that recognize the heightened protection that the Constitution provides for conduct that takes place in the home. *See Kyllo v. United States*, 533 U.S. 27, 37 (2001) ("In the home, our cases show, all details are intimate details, because the entire area is held safe from prying government eyes."); *Boyd v. United States*, 116 U.S. 616, 630 (1886) ("[i]t is not the breaking of his doors and the rummaging of his drawers that constitutes the essence of the [constitutional] offence, but it is the invasion of his indefeasible right of personal security, personal liberty, and private property"); *see also Griswold*, 381 U.S. at 485-486; *Stanley v. Georgia*, 394 U.S. 557, 565 (1969). The precincts of the home are no less inviolate when those residing within are gay or lesbian.

Bowers also relied upon inaccurate factual assumptions about the family relationships of gay men and lesbians. In so doing, *Bowers* discounted the effect on families of laws criminalizing private, consensual sexual conduct between adults of the same sex. In *Bowers*, the Court said that "[n]o connection between family, marriage, or procreation, on the one hand, and homosexual activity, on the other, has been demonstrated." 478 U.S. at 191. But since *Bowers* was decided, that connection has been well documented.

It is now known that hundreds of thousands of gay men and lesbians have stable relationships, are parents, and raise their children in a family setting. *See* D'Vera Cohn, *Count of Gay Couples Up 300%*, Wash. Post, Aug.

22, 2001, at A3 (Census Bureau reports 1.2 million people indicated in 2000 census that they live with a same-sex "unmarried partner"); Dan Black et al., *Demographics of the Gay and Lesbian Population in the United States: Evidence from Available Systematic Data Sources*, 37 Demography 139, 150 (May 2000) (estimating, based on 1990 census data, that about 22% of partnered lesbians and 5% of partnered gay men are raising children in their home); *cf.* American Academy of Pediatrics, *Technical Report: Coparent or Second-Parent Adoption by Same-Sex Parents*, 109 Pediatrics 341 (Feb. 2002) (at least one million children in the United States, and likely many more, have at least one gay or lesbian parent). The Constitution protects families from state interference, *see Troxel v. Granville*, 530 U.S. 57 (2000), even when the family in question is not a "traditional" one. *See id.* at 98 (Kennedy, J., dissenting); *Moore v. City of East Cleveland*, 431 U.S. 494, 506 (1977) (plurality) (overturning criminal conviction on substantive due process grounds because "the Constitution prevents East Cleveland from standardizing its children – and its adults – by forcing all to live in certain narrowly defined family patterns").

Through its policies urging nondiscrimination on the basis of sexual orientation in adoption, child custody, and visitation, the ABA has repeatedly acknowledged the importance of ensuring that the laws do not undermine the stability of families formed by gay and lesbian couples. *See* page 2, *supra; see also* American Law Institute, *Principles of the Law of Family Dissolution* § 2.12(d) & (e) (2002) (recommending that States prohibit judges from considering sexual orientation or extramarital sexual conduct in determining legal custody of children); *id.* § 2.12 cmt. f reporter's notes (collecting studies showing that "there is no correlation between a parent's sexual identity and that of the child, and no diminution in measures of self-esteem or social adjustment" based on the sexual orientation of the parents; that "being raised by a homosexual parent is no worse for a child than being raised by a heterosexual parent"; and that "gay men and lesbians are no more likely to molest children than heterosexual adults"). Similarly, the

legal profession and corporate America now provide health and other benefits (including adoption leave) to gay men and lesbians for their domestic partners and their children.[13] Local governments have established domestic partnership registries and offer a range of benefits to gay and lesbian families, even in States with sodomy laws.[14]

As noted above, when the facts upon which a decision is premised have changed, or new information is brought to light, it is appropriate for the Court to revisit that decision. *See* p. 15, *supra*. Thus, as Justice Brandeis explained, "in cases involving [the application of the substantive component of the Due Process Clause], this court must, in order to reach sound conclusions, feel free to bring its opinions into agreement with experience and with facts newly

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[13] For example, 57 of the nation's top revenue-producing law firms that reported to NALP that they prohibit discrimination on the basis of sexual orientation, *see* note 6, *supra*, and App., *infra*, 17a-19a, also indicated that they provide benefits to the same-sex partners of their employees. Moreover, as is the case with policies of nondiscrimination based on sexual orientation, *see* note 6, *supra*, a number of other major law firms provide more detailed information on their websites specifying that they offer such benefits. *See also Two Firms Rated Best for Working Moms*, N.Y. Lawyer, http://www.nylawyer.com/news/02/10/100102r.html, Oct. 1, 2002 (discussing firms offering adoption leave that affirmatively includes gay and lesbian attorneys); Mark Hansen, *Bolstering Benefits*, 84 A.B.A.J. 32 (1998) (before offering health and other benefits to partners of gay and lesbian employees, the Houston firm of Vinson & Elkins "surveyed other firms it regards as its peers, only to learn that many already offer such coverage"). Law schools likewise are providing such benefits to their employees and students. *See* Law School Admission Council, *supra*, at 6-11. Those actions reflect a more general trend in corporate policies. *See* Human Rights Campaign Foundation, *supra*, at 18 (reporting that 4,285 employers in all 50 States provide domestic partner health insurance benefits to same-sex partners).

[14] *See, e.g.*, Human Rights Campaign Foundation, *supra*, at 11-12, 15 (listing cities and counties that offer domestic partner health benefits and/or have domestic partner registries in Florida, Louisiana, Missouri, North Carolina, and Texas, all of which have sodomy laws).

ascertained." *Burnet v. Coronado Oil Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting), *quoted with approval in Vasquez v. Hillery*, 474 U.S. 254, 266 (1986).

3. *Bowers* should be overruled because it is inconsistent with *Romer v. Evans*.

In *Romer v. Evans*, 517 U.S. 620 (1996), the Court held that a State violated the Equal Protection Clause by enacting a provision that was justified solely by a desire to deny gay men and lesbians the rights enjoyed by other citizens. *Romer*'s holding that the mere desire "to make [gay men and lesbians] unequal to everyone else" was not a legitimate governmental interest, *id.* at 635, is inconsistent with *Bowers*' holding that the "belief of a majority of the electorate in Georgia that homosexual sodomy is immoral and unacceptable" was sufficient to justify a criminal sodomy law, 478 U.S. at 196. As the dissenting Justices in *Romer* observed, the majority's decision in *Romer* cannot be reconciled with the decision in *Bowers*. *See* 517 U.S. at 640-642 (Scalia, J., dissenting, joined by Rehnquist, C.J., and Thomas, J.). Respondent admits as much when it asserts that *Bowers* permits a State to fine or imprison a homosexual for engaging in sodomy, but concedes (Br. in Opp. 19) that *Romer* would not permit a State to discourage an individual from engaging in sodomy by denying a "practicing homosexual[ ]" the opportunity to attend a public university. Given the inconsistency between *Bowers* and the subsequent decision in *Romer*, *Bowers* should be overruled. *See Agostini v. Felton*, 521 U.S. 203, 235-236 (1997) ("[S]tare decisis does not prevent us from overruling a previous decision where there has been a significant change in or subsequent development of our constitutional law.").

Romer applied long-settled Equal Protection Clause principles and has been cited with approval by the Court in a variety of settings. *See, e.g., Vacco v. Quill*, 521 U.S. 793, 799 (1997); *Columbia Union Coll. v. Clark*, 527 U.S. 1013, 1015 (1999) (Thomas, J., dissenting from the denial of certiorari).

Bowers has not fared as well. Lower courts have struggled with the scope of *Bowers*' holding, particularly after *Romer*. *See, e.g., Marcum v. McWhorter*, 308 F.3d 635, 645 (6th Cir. 2002) (Clay, J., concurring in judgment); *Sterling v. Burough of Minersville*, 232 F.3d 190, 194-195 (3d Cir. 2000); *Stemler v. City of Florence*, 126 F.3d 856, 873-874 (6th Cir. 1997); *Nabozny v. Podlesny*, 92 F.3d 446, 458 & n.12 (7th Cir. 1996); *James v. Douglas*, 941 F.2d 1539, 1543 (11th Cir. 1991). A number of state courts have rejected the reasoning of *Bowers* as inconsistent with rule-of-law norms. *See Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App.), *appeal denied* (Tenn. 1996); *Commonwealth v. Wasson*, 842 S.W.2d 487 (Ky. 1992).

Indeed, the majority opinions of this Court have not embraced *Bowers*. In addition to the notable absence of any reference to *Bowers* in the Court's opinion in *Romer*, *Bowers*' analysis has not been relied upon in any majority opinion in a case involving the definition of "liberty" for purposes of substantive due process. *Cf. Casey*, 505 U.S. at 855 (discussing constitutional decisions that were overruled by the Court because related principles of law had developed that "left the old rule no more than a remnant of abandoned doctrine"). Nor has the holding of *Bowers* given rise to any individual or societal reliance that would warrant its retention despite its flaws. *Cf. id.* at 856, 858 (declining to overrule *Roe v. Wade*, "[e]ven on the assumption that the central holding of *Roe* was in error," because, in part, "people have organized intimate relationships and made choices that define their views of themselves and their places in society, in reliance on the availability of abortion in the event that contraception should fail"). In the years since *Bowers* was handed down, its reasoning has been steadily undermined by subsequent legal developments in the States. Numerous States have repealed or invalidated

their criminal sodomy laws. *See* Pet. 24.[15] Thirteen States and hundreds of localities have enacted civil rights protections for gay men and lesbians in their stead.

In light of the Court's more recent decision in *Romer* holding that a desire to deny gay men and lesbians the rights enjoyed by other citizens is not a legitimate government interest, as well as the actions by States verifying the conclusion of *Romer* – decriminalizing sodomy, protecting gay men and lesbians from discrimination, and providing health and other benefits for the families of gay men and lesbians – *Bowers* should be overruled. That is particularly so because *Bowers* was "decided by the narrowest of margins, over spirited dissents challenging the basic underpinnings" of that decision, has "been questioned by Members of the Court in later decisions and [has] defied consistent application by the lower courts." *Payne*, 501 U.S. at 828-830.

[15] Similar developments have taken place at the international level. Article 17(1) of the International Covenant on Civil and Political Rights prohibits signatories from engaging in "arbitrary or unlawful interference with [a person's] privacy, family, home or correspondence." 999 U.N.T.S. at 177. That provision is construed by the United Nations Human Rights Committee to prohibit a signatory from criminalizing consensual sodomy. *See Toonen v. Australia*, U.N. GAOR, Hum. Rts. Comm., 50th sess., 448th mtg. ¶¶ 8.2-8.6, U.N. Doc. CCPR/C/50/D/488/1992 (1994). Moreover, Article 26 of the Covenant, which requires that each country's law "guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status," 999 U.N.T.S. at 179, is construed to proscribe discrimination on the basis of sexual orientation. *See Toonen* ¶ 8.7. The Covenant was ratified by the United States in 1992. *See* 138 Cong. Rec. 8070-8071 (1992). A determination that the Texas Homosexual Conduct Law violates the Constitution would, in addition to comporting with rule-of-law principles underlying American jurisprudence, also bring the United States into compliance with its international commitments.

C. Petitioners' Criminal Convictions Under The Texas Homosexual Conduct Law Violate The Equal Protection Clause.

Even if the Court determines that *Bowers* should not be overruled, the judgment of the Texas Court of Appeals should be reversed because the Texas Homosexual Conduct Law is based on a classification that is not rationally related to a legitimate governmental interest and thus violates the Equal Protection Clause. This issue was not addressed in *Bowers*, *see* 478 U.S. at 196 n.8, but is particularly pertinent in this case because, unlike the facially neutral law in *Bowers*, the Texas Homosexual Conduct Law expressly applies only to homosexual conduct.

1. The Texas Homosexual Conduct Law discriminates against gay men and lesbians by criminalizing conduct by same-sex couples that is not criminal when engaged in by different-sex couples.

The Equal Protection Clause is designed to prevent legislative excesses by requiring "the democratic majority to accept for themselves and their loved ones what they impose on you and me." *Cruzan v. Missouri Dep't of Health*, 497 U.S. 261, 300 (1990) (Scalia, J., concurring); *see also Railway Express Agency, Inc. v. New York*, 336 U.S. 106, 112 (1949) (Jackson, J., concurring) ("[T]here is no more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally."). The Texas Homosexual Conduct Law violates that fundamental tenet of the rule of law by substantially limiting gay and lesbian couples from engaging in sexual intimacy but permitting heterosexuals (married or single) to engage in intimate acts that Texas concedes are the "same act[s]" that are prohibited for homosexuals. Br. in Opp. 18. Those acts are defined by Texas law as "deviate sexual intercourse" regardless of who engages in them, *see* Tex. Pen. Code § 21.01(1), but

Texas criminalizes the conduct only when it is engaged in by same-sex couples.

That disparate treatment of homosexual and heterosexual sodomy is a modern development that reflects the unwillingness of the majority to be subject to the same strictures imposed upon the minority. *See* p. 18, *supra*. In 1962, when the ALI recommended the repeal of all criminal sodomy laws involving consenting adults, every State had a criminal law that prohibited all sodomy, regardless of the sex or sexual orientation of the couples involved. *See* Christopher R. Leslie, *Creating Criminals: The Injuries Inflicted by "Unenforced" Sodomy Laws*, 35 Harv. C.R.-C.L. L. Rev. 103, 111 (2000). It was only in 1969, in response to that recommendation, that a State (Kansas) decriminalized sodomy for heterosexuals but not for same-sex couples. Seven other States (Arkansas, Kentucky, Missouri, Montana, Nevada, Tennessee, Texas) then followed suit and redefined their sodomy laws to single out same-sex conduct. *See* William N. Eskridge, Jr., *Hardwick and Historiography*, 1999 U. Ill. L. Rev. 631, 664, 691.[16]

The partial repeals in those eight States thus attempted to cure the ALI's rule-of-law objection that the State was regulating private intimate conduct – conduct that was "anything but uncommon" among the heterosexual majority. American Law Institute, *Model Penal Code and Commentaries* § 213.2 cmt. at 363 (1980). In singling out gay men and lesbians, however, those States violated another rule-of-law requirement articulated by the ALI,

[16] Besides the Texas statute, only two States (Kansas and Missouri) still have in effect sodomy statutes that, on their face, criminalize only same-sex sodomy. Nevada repealed its same-sex sodomy statute in 1993; courts in Arkansas, Kentucky, Montana, and Tennessee invalidated their same-sex sodomy laws on state constitutional grounds after *Bowers*. *See* Eskridge, *supra*, at 633 n.11, 686 tbl. The sodomy law in Oklahoma, although written to encompass both heterosexual and homosexual sodomy, currently applies only to homosexual sodomy due to the judicial invalidation of the statute as it applied to heterosexual couples. *See Post v. State*, 715 P.2d 1105 (Okla. Crim. App. 1986).

namely the evenhanded application of the criminal law. The discriminatory intent behind those changes was clear. For example, Arkansas repealed its general sodomy law in 1975 as part of a comprehensive criminal code revision (as recommended by the ALI's Model Penal Code and the ABA), but in 1977 enacted a new law prohibiting only same-sex sodomy. *See* Eskridge, *supra*, at 664, 687 tbl. The chief sponsor of the law claimed at the time that the new law was "aimed at weirdos and queers." Petition for Certiorari in *Limon v. Kansas*, No. 02-583, at 5 (Oct. 2002).

2. Under the Equal Protection Clause, the desire to harm and stigmatize members of a group, such as gay men and lesbians, is not a legitimate governmental interest.

The Equal Protection Clause provides that the State may not treat an individual differently from similarly situated individuals absent a rational basis for the differential treatment. *See Village of Willowbrook v. Olech*, 528 U.S. 562, 564 (2000) (per curiam). The classification created by the Texas Homosexual Conduct Law is not rationally related to any legitimate governmental objective. Respondent suggests that the law encourages "marriage" and "biological reproduction." Br. in Opp. 18. But there is no relationship between those interests and the classification at issue, which allows some unmarried people (heterosexuals) to engage in non-procreative intimate relationships while prohibiting other unmarried people (gay and lesbian couples) from engaging in the very same conduct. *Cf. Eisenstadt v. Baird*, 405 U.S. 438, 447 n.7, 453-454 (1972) (even if State had power to prohibit distribution of contraceptives to all persons, State has no rational basis for prohibiting distribution of contraceptives only to unmarried persons).

Respondent also invokes tradition and history. Br. in Opp. 18-19. But those arguments cannot sustain the classification embodied in Texas's law, which criminalizes only homosexual sodomy and permits the heterosexual

sodomy that had, as a historical matter, been equally disfavored by the law. *See* page 18, *supra*. Rather than justifying the classification under the Equal Protection Clause, this deviation from historical practice should trigger a more "careful consideration" to determine whether it is "obnoxious to the constitutional provision." *Romer*, 517 U.S. at 633 (quoting *Louisville Gas & Elec. Co. v. Coleman*, 277 U.S. 32, 37-38 (1928)).

Ultimately, the only rationale relied upon by Texas for prohibiting homosexuals from engaging in "the same act" that is lawful for heterosexuals is the "communal belief that the [homosexual] conduct is wrong and should be discouraged." Br. in Opp. 18, 19.[17] But that belief is not sufficient. As the Court held in *Romer*, mere disapproval of homosexuality does not constitute a "legitimate governmental purpose" for "singling out a certain class of citizens for disfavored legal status or general hardships." 517 U.S. at 634, 633. "[I]f the constitutional conception of 'equal protection of the laws' means anything, it must at the very least mean that a bare ... desire to harm a politically unpopular group cannot constitute a *legitimate* governmental interest." *Ibid.* (quoting *Department of Agric. v. Moreno*, 413 U.S. 528, 534 (1973)); *see also City of Cleburne v. Cleburne Living Ctr., Inc.*, 473 U.S. 432 (1985). Indeed, exercises of government power based on considerations "such as

[17] Respondent also describes this "communal belief" in terms of "public morality." Br. in Opp. 15, 16, 18. But respondent's use of that label to describe the government interest does not negate the Court's obligation to determine whether the statutory classification is rooted in bias or prejudice. Experience teaches that prejudice sometimes is clothed in moral terms. *See Loving v. Virginia*, 388 U.S. 1, 3 (1967) (lower court relied upon the "fact that [God] separated the races" to "show[ ] that he did not intend for the races to mix" in upholding anti-miscegenation law); *Moreno*, 413 U.S. at 535 n.7 (adverse treatment of households of unrelated persons originally defended on moral grounds). In this case, from its origins and effects, the Texas Homosexual Conduct Law leaves little doubt that the State's asserted interest in serving "public morality" is in reality nothing more than a desire to express its disapproval of gay people through the criminal law.

caprice, passion, bias, and prejudice are antithetical to the rule of law." *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 475 (1993) (O'Connor, J., dissenting).[18]

Texas thus has failed to articulate a legitimate governmental interest that is served by its Homosexual Conduct Law. Yet even if such an interest could be identified, Texas's conceded practice of "rarely, if ever, enforc[ing]" the law criminally, *State v. Morales*, 826 S.W.2d 201, 203 (Tex. App. 1992), *rev'd on jurisdictional grounds*, 869 S.W.2d 941 (Tex. 1994), undermines any claim that the law actually furthers that interest. *See Furman v. Georgia*, 408 U.S. 238, 312-313 (1972) (White, J., concurring) ("common sense and experience tell us that seldom-enforced laws become ineffective measures for controlling human conduct" and thus the decision to apply law to only a few individuals makes the government's interest "too attenuated"); *id.* at 310 (Stewart, J., concurring) (similar); *cf. Nashville, Chattanooga & St. Louis Ry. v. Browning*, 310 U.S. 362, 369 (1940) ("Deeply embedded traditional ways of carrying out state policy ... are often ... truer than the dead words of the written text.").

The Texas Homosexual Conduct Law renders gay men and lesbians strangers to the law and brands them criminals for engaging in the same intimate consensual conduct that is lawful for the majority. Such misuse of the criminal

[18] The criminal sodomy law at issue here shares another common feature with the state enactment held unconstitutional in *Romer*. The provision in *Romer* barred localities from enacting statutes protecting gay men and lesbians from discrimination; state sodomy laws can serve as a functional bar to the enactment of laws prohibiting sexual orientation discrimination or hate crimes, particularly at the local level. As petitioners recount (Pet. 14-16), the existence of sodomy laws skews the political process by permitting opponents of these laws to label gay men and lesbians as criminals who should not be entitled to invoke the protections of the government and thus interferes with normal democratic processes. *Cf. United States v. Carolene Prods. Co.*, 304 U.S. 144, 152-153 n.4 (1938); *Washington v. Glucksberg*, 521 U.S. 702, 737 (1997) (O'Connor, J., concurring).

sanction is antithetical to the rule of law, which "implies equality and justice in its application." *Papachristou v. City of Jacksonville*, 405 U.S. 156, 171 (1972). The Texas Homosexual Conduct Law should be declared unconstitutional.

CONCLUSION

For the reasons set forth above, the judgment of the Texas Court of Appeals should be reversed.

Respectfully submitted,

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JANUARY 2003

OFFICIAL POLICIES AND CONSTITUTIONAL AMENDMENTS OF THE AMERICAN BAR ASSOCIATION

1. Policy adopted by the House of Delegates, August 1973

Be It Resolved, That the legislatures of the several states are urged to repeal all laws which classify as criminal conduct any form of non-commercial sexual conduct between consenting adults in private, saving only those portions which protect minors or public decorum.

2. Policy adopted by the House of Delegates, February 1979

Be It Resolved, That the American Bar Association favors the ratification by the United States of the International Covenant on Civil and Political Rights and urges the Senate to give its advice and consent to ratification of the Covenant subject to the following reservations, declarations, statements and understandings recommended to the Senate by the Departments of State and Justice (and an understanding on "right to life"):

A. The Constitution of the United States and Article 19 of this Covenant contain provisions for the protection of individual rights, including the right of free speech, and nothing in this Covenant shall be deemed to require or authorize legislation or other action by the United States which would restrict the right of free speech protected by the Constitution, laws, and practice of the United States.

B. The United States' adherence to Article 6 (concerning the "right to life") is subject to the Constitution and other laws of the United States.

C. The United States reserves thæ right to impose capital punishment on any person duly convicted under existing or future laws permitting the imposition of capital punishmentt.

D. The United States does not adlhere to Paragraph (5) of Article 9 or to the thmird clause of Paragraph (1) of Article 15 (compensation for unlawful arrest, and retroactive lighter criminal penalties).

E. The United States considers the (prisoner segregation and rehabilitation stamdards) rights enumerated in Paragraphs (2) andl (3) of Article 10 as goals to be achieved progresssively rather than through immediate implementtation.

F. The United States understamds that subparagraphs (3)(b) and (d) of Article 14 do not require the provision of court-appointed counsel when the defendant is financially able to retain counsel or for petty offenses for which imprisonment will not be imposed. The Unitted States further understands that Paragraph ((3)(e) does not forbid requiring an indigent defendlant to make a showing that the witness is necessary for his attendance to be compelled by the court. The United States considers that provissions of United States law currently in force consstitute compliance with Paragraph (6). The Unitted States understands that the prohibitiom on double jeopardy contained in Paragraph (77) is applicable only when the judgment of acquiittal has been rendered by a court of the same governmental unit, whether the Federal Governnment or a constituent unit, which is seeking a neew trial for the same cause.

G. The United States declares that the (natural resources utilization) right referred to in Article 47 may be exercised only in accordance with international law.

H. The United States shall implement all the provisions of the Covenant over whose subject matter the Federal Government exercises legislative and judicial jurisdiction; with respect to the provisions over whose subject matter constituent units exercise jurisdiction, the Federal Government shall take appropriate measures, to the end that the competent authorities of the constituent units may take appropriate measures for the fulfillment of this Covenant.

I. The United States declares that the provisions of Articles 1 through 27 of the Covenant are not self-executing.

3. Policy adopted by the House of Delegates, August 1987

BE IT RESOLVED, That the ABA condemns crimes of violence including those based on bias or prejudice against the victim's race, religion, sexual orientation, or minority status, and urges vigorous efforts by federal, state, and local officials to prosecute the perpetrators and to focus public attention on this growing national problem.

4. Policy adopted by the House of Delegates, August 1989

BE IT RESOLVED, That the American Bar Association urges the Federal government, the states and local governments to enact legislation, subject to such exceptions as may be appropriate, prohibiting discrimination on the basis of sexual orientation in employment, housing and public

accommodations. "Sexual orientation" means heterosexuality, bisexuality and homosexuality.

5. Policy adopted by the House of Delegates, August 1990

BE IT RESOLVED, That the American Bar Association adopts the Model Code of Judicial Conduct (August 1990), as amended, including the Preamble, Terminology Section, Canons, text, Commentary and Application Section, to replace the ABA Code of Judicial Conduct (adopted August 1972, as amended August 1982 and August 1984).

6. Policy adopted by the House of Delegates, August 1991

BE IT RESOLVED, That the American Bar Association supports the enactment of authoritative measures requiring studies of the existence, if any, of bias in the federal judicial system, including bias based on race, ethnicity, gender, age, sexual orientation and disability, and the extent to which bias may affect litigants, witnesses, attorneys and all those who work in the judicial branch.

BE IT FURTHER RESOLVED, That the American Bar Association urges that such studies include the development of remedial steps to address and eliminate any bias found to exist.

7. Policy adopted by the House of Delegates, February 1992

BE IT RESOLVED, That the American Bar Association opposes any efforts by government to withhold funds from, or otherwise penalize, educational institutions for denying access to campus placement facilities to government employers

who contravene university policies by discriminating on the basis of sexual orientation.

8. Amendment adopted by the House of Delegates, August 1992

PROPOSAL: Amend the Constitution to provide that the National Lesbian and Gay Law Association (hereinafter "NLGLA") is an affiliated organization.

Amend Section 6.8(a)(1) to read as follows:

(1) The American Judicature Society, the American Law Institute, the Association of American Law Schools, the Conference of Chief Justices, the Hispanic National Bar Association, the National Asian Pacific American Bar Association, the National Association of Attorneys General, the National Association of Bar Executives, the National Association of Women Judges, the National Bar Association, the National Conference of Bar Examiners, the National Conference of Commissioners on Uniform State Laws, the National Conference of Women's Bar Associations, the National Lesbian and Gay Law Association and the National Organization of Bar Counsel.

9. Policy adopted by the House of Delegates, August 1994

BE IT RESOLVED: That Standard 211 of the American Bar Association Standards for the Approval of Law Schools be amended to read as follows:

(a) The law school shall maintain equality of opportunity in legal education, including employment of faculty and staff, without discrimination or segregation on ground of race, color,

religion, national origin, sex or sexual orientation.

(b) A law school shall not use admission policies or take other action to preclude admission of applicants or retention of students on the basis or race, color, religion, national origin, sex or sexual orientation.

(c) The denial by a law school of admission to a qualified applicant will be treated as made upon the ground of race, color, religion, national origin, sex or sexual orientation if the ground of denial relied upon is

(i) a state constitutional provision or statute that purports to forbid the admission of applicants to a school on the ground of race, color, religion, national origin, sex or sexual orientation; or

(ii) an admissions qualification of the school that is intended to prevent the admission of applicants on the ground of race, color, religion, national origin, sex or sexual orientation though not purporting to do so.

(d) The denial by a law school of employment to a qualified individual will be treated as made upon the ground of race, color, religion, national origin, sex or sexual orientation if the ground of denial relied upon is an employment policy of the school which is intended to prevent the employment of individuals on the ground of race, color, religion, national origin, sex or sexual orientation though not purporting to do so.

(e) This Standard does not prevent a law school from having a religious affiliation or purpose and adopting and applying policies of admission of

students and employment of faculty and staff that directly relate to this affiliation or purpose so long as (1) notice of these policies has been given to applicants, students, faculty and staff before their affiliation with the law school, and (2) the religious affiliation, purpose or policies do not contravene any other Standard, including Standard 405(d) concerning academic freedom. These policies may provide a preference for persons adhering to the religious affiliation or purpose of the law school, but shall not be applied to use admission policies or take other action to preclude admission of applicants or retention of students on the basis of race, color, religion, national origin, sex or sexual orientation. This Standard permits religious policies as to admission, retention and employment only to the extent that they are protected by the United States Constitution. It shall be administered as if the First Amendment of the United States Constitution governs its application.

(f) Equality of opportunity in legal education includes equal opportunity to obtain employment. Each school should communicate to every employer to whom it furnishes assistance and facilities for interviewing and other placement functions the school's firm expectation that the employer will observe the principle of equal opportunity and will avoid objectionable practices such as

(i) refusing to hire or promote members of groups protected by this policy because of the prejudices of clients or of professional or official associates;

(ii) applying standards in the hiring and promoting of such individuals that are higher than those applied otherwise;

(iii) maintaining a starting or promotional salary scale as to such individuals that is lower than is applied otherwise; and

(iv) disregarding personal capabilities by assigning, in a predetermined or mechanical manner, such individuals to certain kinds of work or departments.

10. Policy adopted by the House of Delegates, August 1995

RESOLVED, That the American Bar Association supports the enactment of legislation and the implementation of public policy providing that child custody and visitation shall not be denied or restricted on the basis of sexual orientation.

11. Policy adopted by the House of Delegates, August 1996

RESOLVED, That the American Bar Association urges state, territorial and local bar associations to study bias in their community against gays and lesbians within the legal profession and the justice system and make appropriate recommendations to eliminate such bias.

12. Policy adopted by the House of Delegates, February 1999

RESOLVED, That the American Bar Association supports the enactment of laws and implementation of public policy that provide that sexual orientation shall not be a bar to adoption when the

adoption is determined to be in the best interests of the child.

13. Policy adopted by the House of Delegates, August 2002

RESOLVED, That the American Bar Association urges federal, state, territorial, and local governments to enact legislation, promulgate regulations, or take other necessary action to ensure that an unmarried surviving partner who shared a mutual, interdependent, committed relationship with a victim of terrorism or other crime can qualify for crime victim compensation and assistance funds provided by that government to eligible spouses.

FURTHER RESOLVED, That eligibility for such funds should be determined without reference to intestate succession laws and should not affect the operation of such laws.

14. Amendment adopted by the House of Delegates, August 2002

Amend §6.4(e) of the Constitution to read as follows:

§6.4(e) A state or local bar association may not be represented in the House if its governing documents discriminate with respect to membership because of race, sex, religion, creed, color, national origin, ethnicity, age, persons with disabilities and/or sexual orientation.

REPORT NO. 2 OF THE SECTION OF INDIVIDUAL RIGHTS AND RESPONSIBILITIES

RECOMMENDATION*

Be It Resolved, That the legislatures of the several states are urged to repeal all laws which classify as criminal conduct any form of noncommercial sexual conduct between consenting adults in private, saving only those portions which protect minors or public decorum.

REPORT

This resolution and report were approved by the Council of the Section of Individual Rights and Responsibilities at its May 12, 1973, meeting in Washington, D.C. An identical resolution was passed by the Section of Criminal Law on February 11, 1973. The Executive Council of the Young Lawyers Section passed a similar resolution on May 20, 1972,[1] and the Law Student Division adopted the same position at the 1972 Annual Meeting.[2]

The concern of the Section in urging adoption of this resolution is twofold: first, that enforcement of laws relating to private, consenting, noncommercial sexual conduct between adults requires an expenditure of enforcement manpower that could better be used to protect public safety and necessitates police practices that are often reprehensible or unsavory; and, second, that such

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* The recommendation was approved. See page 473.

[1] The resolution of the Young Lawyers Section is annexed as Exhibit A to this report.

[2] The resolution of the Law Student Division is annexed as Exhibit B to this report.

laws impinge on the constitutionally protected zone of privacy that surrounds each individual and serve no valid state purpose.

The purpose of the proposal is neither to advocate nor condemn any particular form of sexual activity between consenting adults. Such questions are best left to the private morals and conscience of each individual. This report is concerned only with what in our society should be the proper scope of the criminal law. The Council of the Episcopal Diocese of New York has clearly articulated the position which underlies this report:

> In matters of private morality, the State rightly seeks to give the protection of the law to the young, the innocent, the unwilling, and the incompetent. However, while adultery, fornication, homosexual acts, and certain deviant sexual practices among competent and consenting adults may violate Judeo-Christian standards or moral conduct, we think that the Penal Law is not the instrument for the control of such practices when privately engaged in, where only adults are involved, and where there is no coercion. We favor repeal of those statutes that make such practices among competent and consenting adults criminal acts.[3]

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[3] Statement, *On Private Sexual Morality*, adopted by the Council of the Episcopal Diocese of New York, March 18, 1971. *See also Resolution On Homosexuals and the Law*, adopted April 12, 1969, by the Council for Christian Social Action of the United Church of Christ: "Even while we proclaim a unity under God which transcends our division . . . we still honor variations among men in their political loyalties, lifestyles, and sexual preferences."

The philosophy of government underlying this view was long ago stated by John Stuart Mill:

> The only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.[4]

With respect to laws concerning consensual sodomy or the "crime against nature," eight states – Colorado, Connecticut, Delaware, Hawaii, Illinois, North Dakota, Ohio, and Oregon – have already removed such provisions from their penal codes. Such revision was recommended by the Model Penal Code of the American Law Institute.[5] A similar recommendation – subsequently enacted into law – was made by the Commission on Homosexual Offenses and Prostitution in Great Britain.[6] Such provisions apply to both heterosexual and homosexual conduct, but are most often applied against homosexuals, both in enforcement of the statutes themselves and as a basis for discrimination against homosexuals on the ground that they are most likely violating the law.[7]

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[4] J.S. Mill, *On Liberty*

[5] American Law Institute, *Model Penal Code* §207, Comment 227-78 (Tent. Draft No. 4, 1955).

[6] *Report of the Commission on Homosexual Offenses and Prostitution, Great Britain* (1963).

[7] Thus, in *Matter of Kimball*, 40 NY A.D. 2d 252 (2d Dept. 1973), the New York Appellate Division for the Second Department, in a case involving the application of an acknowledged homosexual for admission to the Bar, stated: "Accordingly, so long as this statute is in effect (Penal Law §130.38), homosexuality, which, in its fulfillment, usually entails commission of such a statutorily prescribed act, is a factor which could militate against the eligibility of an applicant for admission to the Bar

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A task force of the National Institute of Mental Health has recommended repeal of such provisions to help alleviate this discrimination and the resulting harm it causes the affected individuals.[8]

Further, there is a serious question of the constitutionality of such statutory prohibitions against consensual sodomy. The language of some of the statutes is so vague that it renders the statute unconstitutional.[9] Others are of questionable validity as a result of extensions of the doctrine of the right of privacy, particularly with respect to the body.[10] Those which create classifications based on marital status,

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who proposes to pursue this way of life in disregard of the statute." 40 A.D. 2d at 257. *See* the discussion of discrimination against homosexuals in Report of the Commission on Sex & Law and the Committee on Civil Rights of the Association of the Bar of the City of New York, Intro. 475, 28 *Record of the Assoc. of the Bar of the City of New York* 148 (1973). *See also Government Created Employment Disabilities and the Homosexual,* 82 *Harv. L. Rev.* 1738 (1969); *The Consenting Adult Homosexual and the Law: An Empirical Study of Enforcement and Administration in Los Angeles County,* 13 *U.C.L.A. L. Rev.* 643 (1969).

[8] The report of the task force states: "We believe that most professionals working in this area – on the basis of their collective research and clinical experience and the present overall knowledge on the subject – are strongly convinced that the extreme opprobrium that our society has attached to homosexual behavior, by way of criminal statutes and restrictive employment practices, has done more social harm than good and goes beyond what is necessary for the maintenance of public order and human decency." *Final Report of the Task Force on Homosexuality,* National Institute of Mental Health, October 10, 1969, published in *SIECUS Newsletter*, Vol. VI, No. 2, December 1970, pp. 3-12, at p. 10. *See also Position Paper on Homosexuality and Mental Illness,* National Association for Mental Health, October 17, 1970.

[9] Franklin v. Florida, 257 So. 2d 21 (Fla. 1971).

[10] Roe v. Wade, ___ U.S. ___, 35 L. Ed. 2d 147 (1973); Doe v. Bolton, ___ U.S. ___, 35 L. Ed. 2d 201 (1973); Griswold v. Connecticut, 381 U.S. 479, 14 L. Ed. 2d 510 (1965).

such as the New York statute,[11] are subject to constitutional attack on that basis also as establishing a discriminatory classification.[12]

The constitutional weakness of the sodomy statutes as a result of expansion of the right of privacy also extends to statutory prohibitions on adultery and fornication.[13] Penal Code provisions against adultery and fornication are seldom enforced, in any event.[14] The Model Penal Code of the American Law Institute also recommended deletion of these provisions from the criminal law.[15]

It is the view of this Section that, even aside from the question of the constitutionality of statutory prohibitions on sodomy, adultery, and fornication, these provisions should be eliminated from the criminal law for the reason stated in the Model Penal Code: "No harm to the secular interests of the Community is involved in atypical sexual practice in private between consenting adult partners."[16] The consequence of this, as stated by St. Thomas Aquinas,

[11] N.Y. Penal Law §130.38.

[12] Eisenstadt v. Baird, 405 U.S. 438, 31 L. Ed. 2d 349 (1972).

[13] United States v. Moses, 41 U.S.L.W. 2298 (D.C. Super. Ct., Crim. No. 17778-72, Nov. 3, 1972), held that Congress could not constitutionally prohibit fornication, sodomy, or adultery among consenting adults.

[14] *See* New York County Lawyers Association Committee on Civil Rights, *Report of the Committee for Proposed Changes in the New York State Penal Law in Regard to the crimes of Adultery, Consensual Sodomy, and Prostitution* (February 2, 1973).

[15] *Model Penal Code, op. cit.*

[16] *Id.*

is that "(P)rivate sin is different from public crime, and only the latter lies in the province of man-made law."[17]

One significant effect of attempting to enforce private morality which has only in recent years begun to be fully appreciated is the strain such efforts place on the police by diverting their energies and manpower from enforcement of violent crimes. This effect has been explored through investigations by many groups, including the Commission on Correctional Facilities and Services of the American Bar Association; the San Francisco Committee on Crime; the New York State Legislative Hearings on Victimless Crimes; the National Alliance for Safer Cities; the President's Crime Commission; and the National Council on Crime and Delinquency.[18] The consensus of these groups is that a change in attitude about the function of the criminal law and elimination of many offenses relating to morality from the criminal codes are necessary steps to free the police to concentrate on violent crimes. Further, there is concern over the methods the police must use to enforce such provisions.[19]

[17] Quoted in statement of Rev. Leon A. Dickinson, Jr., Secretary for Chaplains and Religion and Health, United Church of Christ, at New York State Legislative Hearings on Victimless Crime (New York City, Sept. 13, 1971).

[18] For a summary of the recommendations of these and other groups on the question of victimless crimes, *see* E. Kiester, *Crimes with No Victims* (Alliance for a Safer New York, 1972). See also Olivieri and Finkelstein, *Report on "Victimless Crime" in New York State*, 18 *N.Y. Law Forum* 77 (1972).

[19] New York City Police Commissioner Patrick Murphy has stated: "By charging our police with responsibility to enforce the unenforceable we subject them to disrespect and corruptive influences (and) provide the organized criminal syndicates with illicit industries upon which

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This report is not to be taken as advocating elimination of all the so-called "victimless crimes." It has been urged that some of the crimes so classsified do in fact often have victims. Prostitution is the most frequently cited example, where either the prostitutee or the patron may suffer assault. The resolution here proposed would not urge legalization of prostitution, but would apply only to noncommercial sexual activities. Norr does it recommend repeal of existing provisions which protect minors and the public decorum. Rather, we urge the retention of these provisions. The Section does urge, however, that other offenses regarding noncommercial sexxual conduct between consenting adults in private are thee types of "victimless crimes" which should be eliminated frrom the criminal law.

For all the reasons stated above, we urge adoption of the resolution by the House of Delegaates.

McNeill Smith
Chairman

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they thrive." Quoted in *Crimes Without Victiims*, *supra*, note 18, at p. 3. The New York County Lawyers Association Report, *supra*, note 14, at pp. 3-4, states that the enforcement methods used in the area of consensual sodomy "bring our police forces into disrepute: they border on seduction and entrapment."

A Sampling Of Major Law Firms That Have Policies Specifically Prohibiting Discrimination Based On Sexual Orientation*

Akin, Gump, Strauss, Hauer & Feld
Andrews & Kurth
Arnold & Porter
Baker & Hostetler
Baker & McKenzie
Baker Botts
Bingham McCutchen
Brobeck, Phleger & Harrison
Bryan Cave
Buchanan Ingersoll
Cadwalader, Wickersham & Taft
Cahill Gordon & Reindel
Chadbourne & Parke
Cleary, Gottlieb, Steen & Hamilton
Covington & Burling
Cozen O'Connor
Cravath, Swaine & Moore
Davis Polk & Wardwell

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* These 81 firms are all among the 100 top revenue-producing law firms as listed in *The AmLaw 100*, The American Lawyer, July 2002, at 125. Information about the firms' policies was based on the firms' responses submitted to the National Association for Law Placement. *See* National Association for Law Placement, *Directory of Legal Employers* (2002), also available at http://www.nalpdirectory.com. Only firms whose anti-discrimination policies expressly reference sexual orientation are included. As noted above, *see* Br. 10 n.6, several other major law firms, whose responses on their NALP forms did not indicate they have such policies, specify on their websites that they do have such policies.

Debevoise & Plimpton
Dechert
Dorsey & Whitney
Duane Morris
Finnegan, Henderson, Farabow, Garrett & Dunner
Foley & Lardner
Fried, Frank, Harris, Shriver & Jacobson
Gibson, Dunn & Crutcher
Goodwin Procter
Greenberg Traurig
Hale & Dorr
Haynes & Boone
Heller Ehrman White & McAuliffe
Holland & Knight
Howrey Simon Arnold & White
Hunton & Williams
Jenner & Block
Jones, Day, Reavis & Pogue
Katten Muchin Zavis
Kaye Scholer
Kilpatrick Stockton
King & Spalding
Kirkpatrick & Lockhart
Latham & Watkins
LeBoeuf, Lamb, Greene & MacRae
Mayer, Brown, Rowe & Maw
Milbank, Tweed, Hadley & McCloy
Mintz, Levin, Cohn, Ferris, Glovsky & Popeo
Morgan, Lewis & Bockius
Morrison & Foerster
Nixon Peabody
O'Melveny & Myers

Orrick, Herrington & Sutcliffe
Paul, Hastings, Janofsky & Walker
Paul, Weiss, Rifkind, Wharton & Garrison
Pillsbury Winthrop
Piper Rudnick
Proskauer Rose
Quarles & Brady
Reed Smith
Ropes & Gray
Schulte Roth & Zabel
Seyfarth Shaw
Shaw Pittman
Shearman & Sterling
Sidley Austin Brown & Wood
Simpson Thacher & Bartlett
Skadden, Arps, Slate, Meagher & Flom
Squire Sanders & Dempsey
Stroock & Stroock & Lavan
Sullivan & Cromwell
Swidler Berlin Shereff Friedman
Testa, Hurwitz & Thibeault
Thelen Reid & Priest
Troutman Sanders
Vinson & Elkins
Wachtell, Lipton, Rosen & Katz
Weil, Gotshal & Manges
White & Case
Willkie Farr & Gallagher
Wilmer, Cutler & Pickering
Wilson Sonsini Goodrich & Rosati
Winston & Strawn